No. 17747

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

MILTON MICHAELSON, YETTA MICHAELSON and NIAGARA FIRE INSURANCE COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEE NIAGARA FIRE INSURANCE COMPANY.

THOMAS P. MENZIES,
JAMES O. WHITE, JR.,
803 Rowan Building,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellee Niagara Fire Insurance Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEE NIAGARA FIRE INSURANCE COMPANY.

Jurisdiction.

In accordance with Rule 20 (U. S. C. A. 9, Subsection 2b) appellee Niagara Fire Insurance Company states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1332: DISTRICT COURTS; JURISDICTION: DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in

controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-

(1) citizens of different States; * * *."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1291: COURTS OF APPEALS: FINAL DECISIONS OF DISTRICT COURTS.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

The necessary diversity of citizenship arose from the fact that plaintiffs Milton Michaelson and Yetta Michaelson are citizens of the State of California; defendant-appellant Northwestern Mutual Insurance Company (hereinafter referred to as Northwestern) is a citizen of the State of Washington; and defendant-appellee Niagara Fire Insurance Company (hereinafter referred to as Niagara) is a citizen of the State of New York. The amount in controversy exceeds the sum of $10,000.00 exclusive of interest.

Statement of the Case.

The Michaelsons were the owners of certain real property in Culver City, County of Los Angeles, California, which on July 17, 1959 was damaged by fire to the extent of $16,000.00, as stipulated by the parties, and, before trial each insurance company paid the Michaelsons one half of that amount. Prior to that fire appellant Northwestern issued its fire insurance policy to the Michaelsons. Also prior to the fire appellee

Niagara had "bound" coverage on the same premises for identical coverage.

There was due to the Bank of America on the date of the fire the sum of $5,920.02 plus interest and the policy of Northwestern contained a loss payable endorsement to said Bank of America, which form [Ex. N-3] contains the following language:

> "This policy shall remain in full force and effect as to the interest of the Lender for a period of ten (10) days after its expiration unless an acceptable policy in renewal thereof with loss thereunder payable to the Lender in accordance with the terms of this Lender's Loss Payable Endorsement, shall have been issued by some other insurance company and accepted by the Lender." [Rep. Tr. p. 77, lines 12-19].

The same form reserves to the company the right to cancel and states in respect thereto:

> ". . . but in such case this policy shall continue in force for the benefit of the Lender ten (10) days after written notice of such cancellation is received by the Lender and shall then cease." [Rep. Tr. p. 77, line 22, to p. 78, line 1].

At the time of the fire one Ernie Peters was agent both for Northwestern and Niagara; however, at the time of trial was agent only for Northwestern [Rep. Tr. p. 62, lines 3-7]. On or about June 15, 1959 Northwestern advised him that it desired to be relieved of the risk. Ernie Peters, being also an agent of the Niagara, bound insurance on the property with Niagara and filed with Niagara an application for insurance. On June 12, 1959 Mr. Peters so advised Northwestern and stated:

"Will pick up pol. & return to you as soon as other is issued—loss payable involved" [Ex. NW-7, Rep. Tr. p. 36]. Niagara never issued a written policy [Rep. Tr. p. 45, line 24, to p. 46, line 4]. The day before the fire, July 16, 1959, Niagara had written to the agent, Mr. Peters, that it could authorize only $9,500.00, or 50% of the $19,000.00 requested in his application [Ex. NW-6, Rep. Tr. p. 34, lines 2-20; p. 67, line 25, to p. 68, line 13]. However, since Mr. Peters had not received this document prior to the fire of July 17, 1959, he was advised by Mr. Atkins of Niagara that Niagara would be on the loss for the amount stated in the application [Rep. Tr. p. 69, lines 21-24].

Mr. Peters testified that Northwestern had stated to him through its representative that it was their desire to have the policy and had inquired of Mr. Peters as to why they hadn't received it [Rep. Tr. p. 42, lines 3-13]. He was finally advised by Northwestern that because of his delay in returning its policy that Northwestern would send cancellation notices [Rep. Tr. p. 53, lines 8-12], which are in evidence. In one conversation between Mr. Peters and Northwestern Mr. Peters was informed that if he had not returned the original policies by a certain date they would be forced to send out written notice. Mr. Peters testified that a written notice of cancellation was something which he as an agent normally tried to avoid [Rep. Tr. p. 58, line 25, to p. 59, line 8]. Mr. Peters still did not pick up the policy for cancellation, so Northwestern sent separate cancellation notices to the Michaelsons and to the Bank of America [Ex. N-1 and N-2]. The cancellation notice sent to the Bank of America bears the date July 15, 1959 and reads, in part, as follows:

"YOU ARE HEREBY NOTIFIED, in accordance with the policy conditions, of the cancellation of Mercantile Policy No. 1003-8589, issued to Milton Michaelson Yetta Michaelson, loss, if any, payable to Bank of America National Trust & Savings written for a term of 3 years from May 13, 1958 and that 10 days from the date of service of this notice, at 12:00 o'clock noon, standard time, this policy will stand cancelled without further notice, and thereafter be null and void and no liability will exist thereunder * * *."

The notice sent to the Michaelsons bears the same date, July 15, 1959, and is identical in its provisions to the one addressed to Bank of America with the exception that it provides that cancellation will be effective "5 days from the date of service of this notice." Both of these cancellation notices were, therefore, mailed by appellant Northwestern prior to the fire but by their terms were not to become effective until after the fire of July 17, 1959. The agent, Mr. Peters, testified that when Northwestern advised him that it was its intention to send cancellation notices that: "That would have been one of the times probably I called Niagara to check on when they were going to issue the policy", and further that he did not recall having responded to Northwestern upon receiving the advice respecting its sending cancellation notices [Rep. Tr. p. 53, lines 13-22]. Mr. Peters also testified that the reason he did not pick up the policy from the Bank of America was because he did not wish to disturb the bank on the matter [Rep. Tr. p. 44, lines 15-19], and that the Bank of America never authorized him to cancel its insurance with Northwestern Mutual;

that he had no dealings with the bank [Rep. Tr. p. 45, lines 2-6].

The insured, Mr. Michaelson, testified that he had never given the agent, Mr. Peters, authorization to cancel the Northwestern policy before Northwestern sent notice of cancellation or before he had received a policy issued by some other company to replace the Northwestern policy [Rep. Tr. p. 21, lines 10-15], and the agent, Mr. Peters, testified that the Michaelsons never told him that they wanted the Northwestern policy cancelled [Rep. Tr. p. 58, lines 20-22]. Mr. Peters further testified that the usual methods for cancellation of policies are: "picking up of the original, getting a loss policy recently (sic) signed, or formal legal notice" [Rep. Tr. p. 57, lines 13-15].

After the advent of the fire Mr. Michaelson called his agent and had his agent file claim with the Northwestern to recover for the damage he had sustained [Rep. Tr. p. 17, lines 2-6]. The agent, Mr. Peters, then notified Northwestern that a fire had occurred, whereupon Northwestern sent adjusters out to determine the loss and damage and the amount of loss was agreed upon between Mr. Michaelson and Northwestern [Rep. Tr. p. 54, lines 8-20].

Respecting the return premium due from Northwestern to the Michaelsons, it is set forth in the "Statement of Facts" contained in the opening brief of appellant Northwestern (p. 3): "Mr. Michaelson was charged for the Northwestern policy only until June 15, 1959, and he was given a return premium on a pro-rata basis as of that date." It should be noted, however, that no return premium was calculated either by Mr. Peters or

by Northwestern before the fire and that the computation of the return premium was not made until September 8, 1959—some 53 days after the fire [Rep. Tr. p. 53, line 23, to p. 54, line 8].

Issue on Appeal.

The District Court found that Northwestern's policy was in effect at the time of the fire, that Northwestern's policy had not been cancelled, and that neither Northwestern nor Niagara is liable to each other in any sum [Findings of Fact Numbers IV, VI, and VII]. Appellee Niagara deems the sole issue on this appeal to be whether or not the Trial Court was justified in making such findings upon evidence which showed that it was the intention of the insured and the agent to have a new written policy in hand before cancellation of the old policy, that Northwestern had sent written cancellation notices which were not by their terms to be effective until after the fire date, that there was no agreement nor any discussion with the Bank of America, loss payee, respecting cancellation, and that claim was made on Northwestern after the loss occurred.

ARGUMENT.

The Trial Court Was Justified in Finding That Northwestern's Policy Had Not Been Cancelled and Was in Effect at the Time of the Fire.

Rule 52 of Federal Rules of Civil Procedure provides, in part:

> "FINDINGS BY THE COURT
>
> "(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *.

Where findings of fact are supported by substantial evidence and not clearly erroneous, such findings are binding on the Court of Appeals (*Home Indemnity Co. v. Midwest Auto Auction, Inc.,* 285 F. 2d 708). This rule is applicable to inferences drawn from documents or undisputed facts (*United States v. Allinger,* 275 F. 2d 421).

The facts of this case are such that the trial court could and did reasonably hold that the Northwestern Mutual policy had not been cancelled at the time of the loss and that there was no cancellation by substitution. It is not California law that automatically when new insurance coverage is obtained existing coverage will be cancelled. The recent case of *Apparel Mfrs.' Sup. Co. v. National Auto & Cas. Co.,* 189 Cal. App. 2d 443, 11 Cal. Rptr. 380, relied upon by The Honorable Trial Court in its Memorandum of Decision in this case, indicates, as noted by Judge Kunzel, "that whether there is a cancellation by substitution is a question of fact, depending upon the intent of the assured." [Memoran-

dum of Decision, p. 3, lines 1-3.] In the *Apparel Mfrs.'* case the action was one for declaratory relief brought by an insured against two insurance companies. As in this case, one company had issued a policy of insurance, had informed its agent that it wanted to be relieved of the risk, and the same agent had bound coverage with another company. The appellate court, in a lengthy opinion, affirmed the trial court's judgment to the effect that each of the insurers was liable and should contribute equally to the loss. In that case, as in the instant case, the agent did not want the original policy cancelled until he had actually received the new policy. The court noted that there was support in the record for the trial court's determination that the agent had the authority to withhold the assured's assent to the cancellation of the National policy until such time as a policy from the other company was actually in hand. The Court stated in the *Apparel Mfrs'.* case:

> "The trial court was warranted in concluding that while Harrow wanted to avoid the hazard of double premiums, he wanted even more to avoid the hazard of a lack of coverage. * * * until a formal policy should be delivered to him, there was the possibility that the new insurer might modify or withdraw its acceptance of the risk as evidenced by its oral binder." (11 Cal. Rptr. at p. 393).

A modification such as that referred to in the court's reasoning actually occurred here, but the decision of Niagara that it could accept only half of the proffered risk did not reach Mr. Peters until after the loss occurred.

In commenting on the scope of review on appeal of the trial court's findings, the court stated in the *Apparel Mfrs'.* case:

"While an inference might reasonably have been drawn from the evidence that the agreement between Apparel, acting through Harrow, and National, acting through Rossi, was that National's liability should cease immediately upon the coming into being of binding coverage by Yorkshire, the problem presented on appeal is whether there is substantial support in the record for the inference drawn by the trial court that coverage by both National and Yorkshire was in full force and effect at the time of the fire." (11 Cal. Rptr. at p. 392.)

Insurance Code Section 2071, which sets forth the basic fire insurance contract in the State of California, provides, in part:

"Pro rata liability

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

As stated in *Gillies v. Michigan Millers Mut. Fire Ins. Co.,* 98 Cal. App. 2d 743, 221 P. 2d 272, 275:

"A 'specific' policy covers property at a specific location in a specific amount for a specified premium. In event of a loss, the insurer is liable to the extent of its policy. If there are two or more policies of specific insurance they prorate the liability to the extent of their joint coverage."

Questions similar to those presented in the instant case were before the court in *Ohran v. National Automobile Ins. Co.,* 82 Cal. App. 2d 636, 187 P. 2d 66. That

action involved the question of liability under compulsory motor vehicle liability policies. The insured had requested his insurance broker to find cheaper coverage than he had. The broker did find cheaper coverage and the insured notified him that he wanted to cancel the policy which he had. The policy was then returned to the general agent of the original company and a policy ordered from the new company. A cancellation notice was likewise sent, calling for ten day cancellation. Although the decision is complicated somewhat by the fact of the compulsory nature of the coverage, the appellate court holds, based partly upon the acts of the parties, that the original contract was not cancelled, reversing the trial court's ruling. The court notes:

> "In the case at bar the co-insurance clauses in both policies prove that the parties had contemplated the possibility of more than one valid insurance for the same accident. That it was appellant's understanding that both insurance companies were on the risk is shown by the fact that he notified both of the accident and of the opportunity of settlement. The only possible conclusion supported by the evidence is that, both according to the manifest understanding of the parties and in fairness, respondent was on the risk and has to bear its equal share of the loss." (187 P. 2d at p. 72).

The court also gives great weight to the fact that the cancellation notice set forth a cancellation date after the loss, as was the case here, and cites various cases for the proposition that " 'All such transactions are to be construed reasonably and fairly and in accord with the evident understanding of the parties at the time.' "

Chase v. National Indemnity Company, 129 Cal. App. 2d 853, 278 P. 2d 68, 73, involved an action by an insured on automobile policies wherein a bank holding a lien on the vehicle filed a cross-complaint. Prior to the accident giving rise to the action, plaintiff Chase obtained a policy of insurance from Rainier National Insurance Company bearing a loss payable endorsement in favor of the bank. Thereafter, and before the accident of July 13th, the National Indemnity Company issued a new policy to be effective July 12th. The court noted:

> "Therefore it seems clear that the Rainier policy was not canceled at the time of the loss, since no attempt was made to terminate the policy in accordance with requirements of the loss payable indorsement." (278 P. 2d at p. 73).

It is frequently held that where cancellation notice is relied upon to cancel a policy of insurance, the insurance company "* * * must show a strict compliance with its terms in order to effect a cancellation. *Naify v. Pacific Indemnity Company,* 11 Cal. 2d 5, 76 P. 2d 663.

The position taken in this appeal by the appellant Northwestern is difficult to reconcile with its actions and the actions of its agent done before a loss had occurred which might fasten liability upon it. Northwestern sent a cancellation notice which was not, by its terms, to be effective until after the 17th day of July, which was the date of the fire. The failure of the agent to take any action to effectuate cancellation of the policy and the fact that he presented a claim to Northwestern after the loss persuasively indicate that the contract between Northwestern and its insureds was not cancelled as of the date of the loss.

The cases heretofore cited in this brief contain many of the same elements relied upon by the courts deciding them as were present for consideration of the trial court in this case. In the *Apparel Mfrs'.* case, 189 Cal. App. 2d 443, 11 Cal. Rptr. 380, the court noted that it was the desire of the agent to avoid the hazard of lack of coverage which was evidently so in this case because the agent did nothing to pick up the policies, which would have been the normal method for him to effectuate an agreed cancellation. As in the *Ohran* case, 82 Cal. App. 2d 636, 187 P. 2d 66, the co-insurance clauses in the contracts show that the parties had contemplated the possibility of more than one insurance policy being in effect and, further, the acts of the insured and his agent in notifying both companies of the loss and filing a claim with Northwestern manifest the understanding of the insured and the agent that Northwestern was still "on the risk". Likewise, in the *Ohran* case, the court gave great effect to the fact that the cancellation notices there, as here, contained an effective cancellation date after the date of the loss. In *Chase v. National Indemnity Company,* 129 Cal. App. 2d 853, 278 P. 2d 68, the court gave effect to the fact that there was no attempt to terminate the policy in accordance with the requiremens of the loss payable endorsement. In this case the Bank of America, loss payee, was never informed that it was the intention of Northwestern or of the agent or of the insured to cancel the policy and the cancellation notice mailed to both the bank and the Michaelsons contained an effective date subsequent to the date of the loss.

The belated attempt of Northwestern to indicate cancellation prior to the loss, by calculating the return

premium as of a date prior to the loss, was properly considered by the trial court as being of no consequence. It was not until September 8, 1959 that Northwestern computed the return premium based upon the purported June 15th cancellation date. Northwestern's argument of this subject would be more substantive had said computation and the return of premium been accomplished between June 15, the date upon which Northwestern contends its policy was cancelled, and July 17, the date when the fire occurred.

In *Angle v. United States Fidelity and Guaranty Co.*, 201 A. C. A. 833, 20 Cal. Rptr. 391, the court held that the right of an insurance company to prorate its liability vests upon the occurrence of the event giving rise to the liability. There, the court held, as did the Honorable District Court in this case, that two insurance companies, one of which had issued a policy of insurance covering certain property and another of which had issued a binder, must prorate the loss in accordance with the amounts of their policies and that an endeavor by one of the companies after the loss to reduce its coverage would not be effectual.

Conclusion.

Under the evidence presented the Honorable District Court could properly determine that, until the effective date of the written cancellation notices, the manifest intent of the insured, of Northwestern, and of Ernie Peters, its agent, was to have its coverage in effect until such time as a new policy of insurance was in the hands of its insured. Such a determination was made by Judge Kunzel, who stated in his Memorandum of Decision: "* * * the assured certainly didn't intend a cancellation until his lender was satisfied and until he had a policy * * *."

We respectfully urge that the findings and judgment are amply supported by the record.

Respectfully submitted,

THOMAS P. MENZIES,
JAMES O. WHITE, JR.,
By JAMES O. WHITE, JR.,

Attorneys for Appellee Niagara Fire Insurance Company.

Certificate.

I certify, that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES O. WHITE, JR.

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APPELLANT'S REPLY BRIEF.

The Appellee, Niagara, by its Brief, urges the propriety of the trial court's judgment on the following premises:

I. That the trial court has made a finding of fact holding that there was no cancellation by substitution and that such finding cannot be disturbed by the appellate court. (Appellee's Brief, p. 8.)

II. That where there are two California fire policies in force covering the same interest the liability of each carrier is pro-rated. (Appellee's Brief, p. 10; citing Ins. Code Sec. 2071.)

III. That even if there existed an effective cancellation by substitution the mailing of a cancellation

notice by Northwestern would be material and have bearing on whether Northwestern's liability was terminated. (Appellee's Brief, p. 12.)

IV. That the non-compliance with strict policy terms with respect to giving cancellation notice to a loss payee can prevent the application of the normal and usual contract legal principles as to legal relations between the assured and the company. (Appellee's Brief, p. 12.)

The Appellant submits that the judgment of the trial court and the Appellee's premises in support thereof cannot be sustained at law, and in answer thereto asserts:

I.

Re the Assertion That the Trial Court Has Made a Finding of Fact Holding That There Was No Cancellation by Substitution and That Such Finding Cannot Be Disturbed by the Appellate Court. (Appellee's Brief, p. 8.)

The corollary to the rule of the effect to be given to a finding of fact made by a trial court is so fundamental it needs no authority and is that if there is no evidence to support a finding of fact, such a finding by the trial court is without legal significance.

The record establishes that the day before the fire Peters, the agent for the Niagara, arranged with Michaelson to replace the Northwestern coverage with the Niagara coverage, and Michaelson was advised that the cancellation was by mutual agreement. [Rep. Tr. p. 14, lines 5-10; p. 9, lines 2-4.]

The Appellee, on page 8 of its Brief, quotes from Judge Kunzel's Memorandum of Decision as follows: "that whether there is a cancellation by substitution is a question of fact, depending upon the intent of the assured."

Michaelson, the one contracting party, the assured, did not intend to have the Northwestern policy stay in force.

> "The Court: Let's take the first one. When was that?
>
> The Witness: I would say it was about a month prior to the fire." [Rep. Tr. p. 8, lines 18-20.]
>
> "The Court: What was said by you and by Mr. Peters?
>
> The Witness: Well, to the best of my recollection, as I recall—
>
> The Court: Just take it easy.
>
> The Witness: —he mentioned that Northwestern intended to cancel out my insurance company, and I—by mutual agreement, as far as I recall." [Rep. Tr. p. 8, lines 23-25; p. 9, lines 1-4.]
>
> "The Court: Overruled. Did you intend to have two policies cover your building?
>
> The Witness (Michaelson): No." [Rep. Tr. p. 24, lines 12-14.]

Peters, the agent for the Niagara, did not intend that the Northwestern policy stay in force. Peters testified:

> "The Northwestern Mutual wanted to be relieved of the risk, and as a result we rewrote the coverage with the Niagara Insurance Company, to be ef-

> fective, I believe, June the 15th. I have a copy of my original application here, if that will be of any help to you." [Rep. Tr. p. 28, lines 12-16.]

Peters testified further:

> "Q. Mr. Peters, you did not intend that both the Niagara's and the Northwestern Mutual's policies be on the risk at the same time, did you? A. No." [Rep. Tr. p. 33, lines 17-20.]

The uncontroverted evidence by the parties themselves, namely, Mr. Michaelson, the assured, and Mr. Peters, the agent for the Niagara, is that the intention was that only the Niagara policy would be in force and the only conclusion that can be drawn therefrom is that such coverage with the Niagara was substituted for the Northwestern policy.

Any finding by the court that there was agreed upon or intended anything other than cancellation is contrary to this clear and unambiguous evidence, and without support by any other evidence.

The conclusion of the trial court judge, expressed in the Memorandum Decision, that "Additionally, the assured certainly didn't intend a cancellation until the lender was satisfied and until he had a policy" is certainly contrary to the above evidence. The record is lacking in any other evidence supporting such a conclusion.

Appellant submits that such a conclusion, unsupported by any evidence and contrary to the express evidence, can be afforded no legal significance by this appellate court.

II.

Re the Assertion That Where There Are Two California Fire Policies in Force Covering the Same Interest the Liability of Each Carrier Is Pro-Rated.

Any reference to pro-ration begs the question. If the Niagara is the only policy in force by reason of the cancellation by substitution, there is no other applicable coverage with which the Niagara can pro-rate.

III.

Re the Assertion That Even if There Existed an Effective Cancellation by Substitution the Mailing of a Cancellation Notice by Northwestern Would Be Material and Have Bearing on Whether Northwestern's Liability Was Terminated.

The record establishes that the Northwestern had requested Michaelson to be relieved of their risk about June 15, 1959. [Rep. Tr. p. 9, lines 2-4; p. 9, lines 15-19.] That as a result thereof Peters, the Niagara agent, bound the coverage June 15th in the Niagara. The fire occurred July 17th. Peters made inquiry of Niagara for a policy at least three times before the fire. [Rep. Tr. p. 32, lines 7-25; p. 33, lines 1-2.] The Northwestern became concerned in that the policy had not been returned and sent out cancellation notices to the assured and the loss payee. [Rep. Tr. p. 53, lines 8-11.]

The Appellant submits that if as to Michaelson an agreement was reached prior to June 15th between Peters, the agent for Niagara, and Michaelson, if the Niagara coverage commenced June 15th and the North-

western coverage ceased as of that date as to Michaelson, the act of sending cancellation notice to Michaelson is a meaningless act in that the coverage had already been cancelled by law by cancellation by substitution. The later cancellation notice amounts to nothing more than an act done in a super-abundance of caution by the Northwestern. We know of no principle of law that requires that where a contracting party has more than one alternative of termination of obligation that the cautious exercise of both of the alternatives vitiates a prior effective legal act and termination of contractual obligation.

IV.

Re the Assertion That the Non-Compliance With Strict Policy Terms With Respect to Giving Cancellation Notice to a Loss Payee Can Prevent the Application of the Normal and Usual Contract Legal Principles as to Legal Relations Between the Assured and the Company.

The Appellee seems to predicate this proposition on three premises:

(1) The policy endorsement terms with respect to cancellation of a loss payee interest, and

(2) The failure to cancel as to the loss payee automatically suspends all legal principles of termination by agreement, and

(3) That because the Northwestern had not strictly complied with policy terms as to the cancellation to the loss payee, that as a matter of law the assured Michaelson's intentions are conclusively presumed to be contrary to his expressed intentions.

The wording of the loss payable endorsement fails to support the Appellee. If the policy is cancelled by notice

to the loss payee the form provides, "But in such case this policy shall continue in force *FOR THE BENEFIT OF THE LENDER* 10 days after written notice * * *". (Appellee's Brief, p. 3.)

Another portion of the form with respect to loss payees corroborates the intention that the provisions of the policy with respect to the loss payee are only as to the loss payee's interest. "This policy shall remain in force and effect *AS TO THE INTEREST OF THE LENDER,* for a period of ten days after expiration unless an acceptable policy in renewal thereof with loss thereunder payable to the Lender in accordance with the terms of this Lender's Loss Payable Endorsement shall have been issued by some other insurance company and accepted by the Lender." (Appellee's Brief, p. 3.)

It is apparent that the policy makes specific provisions with respect to the loss payee and these provisions, in substance, are as follows:

(a) That there is a special and independent relationship between the company and the loss payee, which relationship is limited to the interest of the loss payee.

(b) That if there is a renewal of coverage that there is no requirement of giving a cancellation notice to the loss payee.

The Appellant submits that the Niagara coverage renewed, by replacement, the same and identical coverage that was afforded by the Northwestern policy. The terms and conditions were the same and the Bank of America was the loss payee under the coverage bound by Peters in the Niagara. [Ex. NW-5.]

There is no evidence in the record that the Niagara was not acceptable to the Bank of America. The fact that the Bank of America is not a party to this action and has made no claim against the Northwestern is worthy of a strong inference that the Bank of America approved of the Niagara policy and accepted its coverage in lieu of the Northwestern policy.

That there was intended to be created distinct interests, that is, the interest of the assured Michaelson and the interest of the loss payee Bank of America, and that such interests could be separately terminated, is specifically indicated in the wording of the Lender's Loss Payable Endorsement, which provides: "Whenever this company shall pay to the Lender any sum for loss or damage under this policy and shall claim that as to the insured no liability exists, this company, at its option, may pay to the Lender * * *". [Ex. N-3.]

In this instance the Northwestern claims that as to the assured, Michaelson, there is no liability because there was an agreement of cancellation by substitution reached between the Northwestern and Michaelson. The Northwestern further asserts that it was the prerogative of the Bank of America, as a party to the contract, to pursue any rights or remedies they may have under the policy and that they elected not to do so.

Cancellation may be effective as to the assured and not to the loss payee.

Lauman v. Springfield Fire & Marine etc., 184 Cal. 650, 195 Pac. 50.

In any event, the limit of the interest of the Bank of America, loss payee, was $5,920.02, the unpaid balance at the time of the fire.

Hayward Lumber Co. v. Lyders, 139 Cal. App. 517, 34 P. 2d 805.

V.

As to Michaelson, if the Niagara Coverage Was in Force, as the Court Has Found, It Is a Necessary Conclusion Therefrom That There Was a Cancellation by Substitution.

In support of the above proposition, the Appellant submits the following:

(1) Michaelson intended a cancellation.

(2) Peters, the agent for both Niagara and Northwestern, intended a cancellation.

(3) Other acts of Niagara confirmed acknowledgment by Niagara of coverage.

These other acts are:

(a) Peters reported the loss to Niagara. [Rep. Tr. p. 38, lines 19-21.]

(b) Niagara, through its agent Peters, who was at the time agent for Niagara acting for Northwestern, gave a return premium to Michaelson calculated on a cancellation date of June 15, 1959. [Rep. Tr. p. 38, lines 12-18.]

(c) Even after learning of the fire Bob Atkins stated that Niagara was on for the full amount. [Rep. Tr. p. 69, lines 22-24; p. 35, lines 16-19.]

Conclusion.

Appellant submits that the evidence establishes that Michaelson and Niagara agreed, through Niagara's agent, Peters, that as to Michaelson's interest the Niagara policy was substituted coverage for the Northwestern policy.

Appellant submits further that, by the Lender's Loss Payable Clause specific terms and conditions, the Niagara policy constitutes a renewal of the Northwestern coverage, but, in any event, the interest of the loss payee, Bank of America, is a separate interest and was not claimed for or in issue in this litigation.

Respectfully submitted,

BOLTON, GROFF & DUNNE,
By GENE E. GROFF,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

GENE E. GROFF